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Applicability of Last Clear Chance

Michael S. Goldberg

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The plaintiff sustained injuries when she was struck on a highway by the defendant's truck. The facts indicated that the plaintiff was negligently inattentive of oncoming traffic when walking onto the highway from between parked cars and that her position of peril was one from which she could have extricated herself. The trial court found that the defendant did not actually see the plaintiff's danger in time to avoid the accident, and it rendered judgment for the defendant. The Third District Court of Appeal reversed the judgment, holding that the jury should have been instructed on last clear chance because evidence showed that the defendant should have seen and appreciated the plaintiff's perilous position in time to avoid injuring her.[1] On certiorari to the Florida Supreme Court, *held*, quashed and remanded: the doctrine of last clear chance is not applicable in a situation where both the plaintiff and the defendant are guilty of concurrent negligence. *Morse Auto Rentals, Inc. v. Kravitz*, 197 So.2d 817 (Fla. 1967).

For many years contributory negligence on the part of a plaintiff was a complete bar to an action for damages based on the negligence of the defendant.[2] The doctrine of last clear chance emerged in the landmark English case of *Davies v. Mann*,[3] in which the plaintiff was allowed recovery in spite of his contributory negligence. Thus, an initial step in countering the harsh doctrine of non-liability due to contributory negligence had been made. Five universal elements concerning application of the "doctrine" eventually became fixed.

> (1) The plaintiff must have been guilty of negligence which placed him in a position of peril; (2) There must be something about the plaintiff's situation that would serve to put . . . [the defendant] on notice of the fact that plaintiff is in peril; (3) The defendant must have been under a legal duty to notice and appreciate plaintiff's peril . . . ; (4) The defendant must have had a capability . . . to avoid inflicting the injury; and (5) The defendant must have failed to take advantage of this opportunity, with resulting injury to the plaintiff.[4]

By the time that the last clear chance doctrine was recognized by Florida courts it had already been "lost in the limbo of proximate cause."[5] Its rationale was that where the defendant had the last opportunity to

1. Kravitz v. Morse Auto Rentals, Inc., 166 So.2d 619 (Fla. 3d Dist. 1964).

2. Schofield, *Davies v. Mann: Theory of Contributory Negligence*, 3 HARV. L. REV. 263 (1890).

3. 152 Eng. Rep. 588 (ex. 1842). The plaintiff negligently left his ass fettered on the highway. The animal, unable to move out of the path of the oncoming traffic, was subsequently hit and killed by the defendant's negligently driven horse and wagon.

4. Connolly v. Steakley, 197 So.2d 524, 526 (Fla. 1967) (concurring opinion).

5. Comment, *Last Clear Chance Doctrine in Florida*, 17 U. MIAMI L. REV. 582, 583 (1963).

avoid the accident, his negligent act was considered the sole proximate cause. The negligence of the plaintiff was reduced to a remote cause.[6] This rationale, by relegating the plaintiff's negligence to a remote cause, leaves something to be desired in that the plaintiff then can be said to be free from contributory negligence. If that is the case, why employ the doctrine of last clear chance at all?[7]

Despite the deficiency of its rationale, Florida has applied the doctrine of last clear chance in four categories[8] of fact patterns. The first category is where the danger is actually seen by the defendant, and the plaintiff is physically *unable* to escape. This category presents the most favorable conditions for the application of the doctrine.[9] The problem of concurring negligence which continues until the moment of impact does not exist because the plaintiff's negligence is said to terminate when he becomes physically unable to escape from his danger.[10] The unterminated negligent act of the defendant is the basis of his liability.[11]

The second category is where the danger is actually seen by the defendant, and the plaintiff is physically *able* to escape.[12] Here, the plaintiff is not helplessly unable to escape but only inattentive and unaware of his own peril. He is concurrently negligent in the sense of being continually oblivious to his own danger.[13] It would stretch the imagination to say that the defendant has committed the last negligent act in this factual pattern. Nevertheless the doctrine is applied because the negligence of the defendant seems more culpable than that of the plaintiff.[14]

The third category is where the danger is not actually seen by the defendant but should have been seen, and the plaintiff is physically *unable* to escape. In this category the problem of concurrent negligence is obviated since the plaintiff is in a situation from which he is physically unable to escape and the defendant has the last opportunity to avert the accident. The doctrine of last clear chance applies to this situation.[15]

6. For Florida cases that spoke in terms of proximate cause in determining whether the doctrine of last clear chance was applicable, see Poindexter v. Seaboard Air Line R.R., 56 So.2d 905 (Fla. 1951); Dunn Bus Serv., Inc. v. McKinley, 130 Fla. 778, 178 So. 865 (1937); Merchants' Transp. Co. v. Daniel, 109 Fla. 496, 149 So. 401 (1933); Shattuck v. Mullen, 115 So.2d 597 (Fla. 2d Dist. 1959).

7. Connolly v. Steakley, 197 So.2d 524, 530 (Fla. 1967) (concurring opinion).

8. *See* Annot., 119 A.L.R. 1041, 1052 (1939).

9. Douglas v. Hackney, 133 So.2d 301 (Fla. 1961); Miami Transit Co. v. Goff, 66 So.2d 487 (Fla. 1953); Merchants' Transp. Co. v. Daniel, 109 Fla. 496, 149 So. 401 (1933).

10. Merchants' Transp. Co. v. Daniel, 109 Fla. 496, 504, 149 So. 401, 403 (1933).

11. The doctrine is applied in nearly all American jurisdictions in category one situations. *See, e.g.*, Southland Butane Gas Co. v. Blackwell, 211 Ga. 665, 88 S.E.2d 6 (1955); Gardner v. Germain, 264 Minn. 61, 117 N.W.2d 759 (1962); Beckstrom v. Williams, 3 Utah 2d 210, 282 P.2d 309 (1955).

12. Douglas v. Hackney, 133 So.2d 301 (Fla. 1961); Williams v. Sauls, 151 Fla. 270, 9 So.2d 369 (1942); Merchants' Transp. Co. v. Daniel, 109 Fla. 496, 149 So. 401 (1933).

13. Connolly v. Steakley, 197 So.2d 524, 527 (Fla. 1967) (concurring opinion).

14. Most jurisdictions apply the doctrine in such a situation. *See, e.g.*, Southern Ry. v. Williams, 243 Ala. 429, 10 So.2d 273 (1942); Sills v. Los Angeles Transit Lines, 40 Cal. 2d 630, 255 P.2d 795 (1953).

15. Consumers Lumber & Veneer Co. v. Atlantic Coast Line R.R., 117 F.2d 329 (5th

The instant case is found within the fourth category. This is where the danger is not actually seen by the defendant but should have been seen, and the plaintiff is physically *able* to escape. This fact pattern definitely involves the problem of concurring negligence because the plaintiff's negligence does not terminate prior to the accident.[16] Historically, in such a fact pattern Florida courts have not applied the doctirne of last clear chance.[17]

The necessary elements for an instruction to the jury on last clear chance were stated by the Florida Supreme Court in *James v. Keene*.[18] The Court stated that if the defendant "should have seen" and appreciated that the plaintiff would not avail himself of "opportunities to escape" from his danger, the doctrine is applicable.[19] The stated elements, however, did not impose the requirement that the plaintiff's negligence actually terminate prior to the accident.[20] Thus, it is understandable that in a number of subsequent cases, including the instant case, appellate courts held that the jury should be instructed on last clear chance where it appeared that the defendant had not actually seen the plaintiff's danger and the plaintiff was physically able to extricate himself.[21]

The Supreme Court, by its holding in the instant case, has clarified the existing law by impliedly limiting the sweeping language of the *Keene*[22] case. It would now appear that Florida, along with the majority of American jurisdictions,[23] will not apply the doctrine of last clear chance

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Cir. 1941) (applying Florida Law); Miller v. Unger, 149 Fla. 79, 5 So.2d 598 (1941); Merchants' Transp. Co. v. Daniel, 109 Fla. 496, 149 So. 401 (1933).

The doctrine is applied by a considerable number of other jurisdictions in a category three situation. *See, e.g.*, Faught v. Washam, 365 Mo. 1021, 291 S.W.2d 78 (1956); Peterson v. Great N. Ry., 166 Wash. 538, 7 P.2d 963 (1932).

16. Merchants' Transp. Co. v. Daniel, 109 Fla. 496, 504, 149 So. 401, 403 (1933).

17. The question of the applicability of the doctrine in this category was decided in the negative by the Florida Supreme Court in Merchants' Transp. Co. v. Daniel, 109 Fla. 496, 149 So. 401 (1933). This position was followed in Connolly v. Steakley, 165 So.2d 784 (Fla. 2d Dist. 1964), *cert. discharged per curiam*, 197 So.2d 524 (Fla. 1967). Certiorari was granted in the instant case because its decision was in conflict with *Connolly*.

18. 133 So.2d 297 (Fla. 1961).

19. *Id.* at 299. The Supreme Court quoted from Parker v. Perfection Cooperative Dairies, 102 So.2d 645, 647 (Fla. 2d Dist. 1958), stating:

> [T]he doctrine is applicable when the evidence shows: (1) That the injured party has already come into a position of peril; (2) that the injuring party then or thereafter becomes, or in the exercise of ordinary prudence ought to have become, aware not only of that fact, but also that the party in peril either reasonably cannot escape from it, or *apparently will not avail himself of opportunities open to him for doing so;* (3) that the injuring party subsequently has the opportunity by the exercise of reasonable care to save the other from harm; and (4) that he fails to exercise such care. (Emphasis added.)

20. This same language appears in Nehring v. Connecticut Co., 86 Conn. 109, 84 A. 301 (1912). In Connecticut the doctrine is applicable in category four cases.

21. Medlock v. McCoy, 183 So.2d 267 (Fla. 4th Dist. 1966); Souvorin v. Lerich, 180 So.2d 180 (Fla. 3d Dist. 1965); Greenfield v. Frantz, 144 So.2d 878 (Fla. 3d Dist. 1962).

22. 133 So.2d 297 (Fla. 1961).

23. Peterson v. Great N. Ry., 166 Wash. 538, 7 P.2d 963 (1932); Meyn v. Dulaney-Miller Auto Co., 118 W. Va. 545, 191 S.E. 558 (1937).

in category four situations where both the plaintiff and the defendant are concurrently negligent.

In future determinations where the defendant does not actually see the plaintiff's danger, whether the doctrine of last clear chance will apply will depend on whether the negligence of the plaintiff is concurring.[24] By the same token, the question whether a plaintiff whose negligence is concurring should have the advantage of the doctrine is dependent upon whether the defendant "actually sees" his danger or "should have seen" it.[25]

This rule can produce paradoxical results. It is possible that as the defendant's negligence increases, his liability will lessen. For example, the man who looks and discovers the danger but who is slow in applying his brakes may be liable, whereas the man who never looks at all is *not* liable unless the plaintiff is in a position of inextricable peril.[26]

The result in the instant case appears to be just; the negligence of both parties seems to have been equivalent, and both parties had an equal chance to avoid the accident. It therefore does not make sense to penalize the negligence of one but not of the other. As different fact patterns add more confusion to the doctrine, an interesting thought is that suggested by Justice O'Connell:

> The real fact is that the contributory negligence rule and the doctrine of last clear chance are both equally primitive devices for achieving justice as between parties who are both at fault. All either does is to place the burden of an accident on one of the parties in face of evidence that both are to blame.[27]

"A better way to achieve justice in such cases is by the comparative negligence principle."[28]

MICHAEL S. GOLDBERG

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24. For a criticism of the term "concurring" as a basis of the applicability of the doctrine see Steinhardt and Simon, *Florida's Last Clear Chance Doctrine*, 7 MIAMI L.Q. 457, 469 (1953):

> In last clear chance cases the negligence of the plaintiff never "ceases" and is always "concurrent."
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> Consider this situation: A driver in an automobile is negligently stalled in the path of an oncoming train. The engineer of the train negligently fails to keep a lookout, and does not see the stalled automobile . . . . In the ensuing impact the driver is injured, as well as several passengers on the train. For purposes of the suit by the driver against the railroad company, the driver's negligence in reference to the last clear chance doctrine will be said not to have "continued" up to the moment of impact but to have "ceased" because the driver was unable to extricate himself from his position by using due care. However, in a suit by the passengers against the driver, can the driver urge that his negligence had ceased when the impact occurred and therefore he is not liable to the passengers? Obviously not.

25. Connolly v. Steakley, 165 So.2d 784 (Fla. 2d Dist. 1964).

26. W. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 476 (1953).

27. Connolly v. Steakley, 197 So.2d 524, 537 (Fla. 1967) (concurring opinion).

28. *Id.*